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Supreme Court of the United States

JOHN DOE, father of minor daughter, H.S.,
JANE DOE, mother of minor daughter, H.S.,
and H.S., a minor female,

Petitioners,

v.

SILSBEE INDEPENDENT SCHOOL DISTRICT,
RICHARD BAIN, JR., GAYE LOKEY,
SISSY McINNIS, DAVID SHEFFIELD,
RAKHEEM BOLTON, and CHRISTIAN ROUNTREE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Three questions are presented:

1. Whether the Fifth Circuit improperly disregarded controlling precedent of the United States Supreme Court in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) and its progeny by concluding that a high school cheerleader's silent refusal to publicly cheer her accused rapist during basketball games was not protected expression under the First Amendment, even when there was no reasonable forecast of a substantial disruption or any articulated pedagogical purpose by school officials.

2. Whether the Fifth Circuit improperly disregarded the no-compelled speech doctrine of the United States Supreme Court in *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943) by concluding that a high school cheerleader must cheer her accused rapist at a basketball game.

3. Whether the Fifth Circuit Court of Appeals improperly disregarded controlling precedent of the United States Supreme Court in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972) when granting Respondents' (except Christian Rountree and Rakheem Bolton) Motions to Dismiss for Failure to State a Claim, Fed. R. Civ. P. 12(b)(6), by concluding the mutually binding Silsbee High School Cheerleader Constitution (contract) did not create a constitutionally protected property interest; and by misconstruing Texas' *Spacek v. Charles*, 928 SW2d 88, 93 (Tex. App. Houston [14th], 1996, writ

denied), which states, "actual physical injury is not required to maintain a constitutional claim," and concluding that "psychological injury alone does not constitute a violation of bodily integrity . . . ." when District Attorney Sheffield made non-prosecutorial statements to the media and illegally made non-prosecutorial statements to a prominent local attorney and the attorney's daughter, which were reasonably calculated to be, and were, disseminated throughout the community, and which disparaged H.S.' credibility in her claim of sexual assault.

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The unpublished opinion of the United States Court of Appeals for the Fifth Circuit filed September 16, 2010 is set forth as Appendix A. The unpublished opinion of the United States District Court for the Eastern District of Texas, Beaumont Division dated October 7, 2009 is set forth as Appendix B.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit denied a timely filed Petition for Rehearing En Banc on November 22, 2010. (App. C) The Supreme Court of the United States has jurisdiction pursuant to Title 28 U.S.C., Section 1254 (1).

STATEMENT OF THE CASE

This is a Petition for Certiorari from the decision of the United States Court of Appeals for the Fifth Circuit affirming the trial court's order granting Respondents' Motions to Dismiss for Failure to State a Claim. Fed. R. Civ. P. 12(b)(6). Petitioners alleged a Title 42 U.S.C. § 1983 action against the Respondents in this matter arising out of events which occurred after a sexual assault of H.S. by the accused Rakheem Bolton, accompanied by Christian Rountree and a third underage male. All were students at Silsbee High School. Petitioners alleged that the Respondents Silsbee ISD, Richard Bain, Jr., Gaye Lokey, Sissy McInnis, and David Sheffield violated H.S.' First and Fourteenth Amendment rights. Those Respondents filed two motions to dismiss. The trial court granted both, dismissed Petitioners' suit, and awarded fees and costs. An

appeal was taken to the United States Court of Appeals for the Fifth Circuit. The Court of Appeals affirmed the trial court on September 16, 2010. Petitioners then filed a Petition for Rehearing En Banc, which was denied on November 22, 2010. Consequently, Petitioners file this Petition for Certiorari.

STATEMENT OF FACTS

In the early hours of October 19, 2008, H.S., a 16-year-old female member of the Silsbee High School cheerleading squad, was pulled into a game room by three males at a post-game house party and, in the dark room, behind a locked door, was sexually assaulted or raped by a high school athlete, Rakheem Bolton ("Bolton"). When other students at the party heard H.S.' cries, they started forcing the locked door, causing Bolton and a companion, Christian Rountree ("Rountree"), to break a window and flee the house into a stand of woods behind the house. The emotional and partially disrobed H.S. was found by the rescuing students under a pool table. The host student's mother helped H.S. from under the table, then wrapped her and took her to another room. The police were called, and several officers arrived and conducted an investigation. Arrest warrants were issued for Rakheem Bolton, Christian Rountree, and their underage male companion. All three were athletes at Silsbee High School. H.S.' mother retrieved her daughter and took her to a clinic where she underwent a "rape kit" examination. H.S. was then entered into a post-sexual assault recovery program. Her therapist in that program advised her to resume her normal academic and cheerleading activities.

Bolton, Rountree, and their underage friend were arrested and placed under a state injunction restricting their proximity to H.S. and her family. Bolton and his companions were not initially indicted when a grand jury considered the matter on January 27, 2009. Two other grand juries would eventually be involved in the matter. Hardin County District Attorney David Sheffield ("Sheffield") told H.S.' father before the first grand jury deliberated that indictments were unlikely because of the accused's race; however, after the first grand jury declined to indict Bolton and Rountree, Sheffield gave a press conference announcing the grand jury's inaction, and stated: "I'm not surprised by the [no-indictment] decision after seeing the evidence I've been privy to . . . ." in clear reference to H.S. and her testimony before the Grand Jury. In at least one subsequent, social conversation, which Sheffield had with Silsbee attorney Bo Horka and Horka's daughter at Horka's office in Silsbee, Sheffield stated that, based on the evidence before the grand jury, the encounter between H.S. and Bolton and Rountree was not a criminal act, and minimized the weight of the evidence presented to the grand jury.

After hearing about Sheffield's comments to Horka from a neighbor, H.S.' father went and spoke to Horka's daughter who confirmed that "Sheffield had disclosed to both [Horka and his daughter] what had transpired before the grand jury regarding H.S., indicated that no rape [had] occurred, gave a negative spin to H.S.' complaint, indicated that [H.S.] was not credible, and inferred that H.S. was of questionable moral character in the episode." Texas statute imposes secrecy, even on the District Attorney, as relates to grand jury proceedings

and testimony.[1] *Stern v. State ex rel. Ansel*, 869 SW2d 614 (Court of Appeals Houston [14th], 1994).

Also on January 27, 2009, Silsbee Independent School District Superintendent Richard Bain, Jr. ("Bain") gave a press conference announcing that Bolton and his companions would be returning to academic and athletic activities without punishment. On or about February 17, 2009, Bolton was returned to Silsbee High School's basketball team roster.

For two games after Bolton had rejoined the Silsbee High School basketball team, the last being a post-season, playoff game in Huntsville, Texas on February 27, 2009, H.S. refused to cheer Bolton on three occasions, and stood in silence, non-disruptively, when Bolton stood alone at the "free-throw" line. During the half-time of the Huntsville game, H.S. was called by Superintendent Bain, an assistant superintendent, Silsbee High School Principal Gaye Lokey ("Lokey"), and Silsbee High School Cheerleading Sponsor Sissy McInnis ("McInnis") into a public area outside of the gymnasium, and effectively told to cheer for Bolton when he was at the free-throw line, or go home. An emotional H.S. refused to cheer for Bolton, her parents unsuccessfully protested, and then drove H.S. home to Silsbee, Texas.

On March 2, 2009, the following school day, H.S.' father (John Doe) met with Superintendent Bain, who remained adamant in his demand that H.S. cheer for Bolton. On March 4, 2009, because H.S. refused to cheer Bolton when he was at the free-throw line, Principal Lokey and Sponsor McInnis delivered a letter to H.S. immediately

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1. Tex. Code Crim. Proc. Ann. art. 20.02 (Vernon Supp.1993)

expelling her from the cheerleading squad, which also had the effect under the Cheerleading Constitution (or contract) of banning H.S.' participation in cheerleading during the succeeding years of her enrollment at Silsbee High School.

At the time of H.S.' being censored for her refusal to cheer Bolton, the Silsbee ISD had a "Cheerleader Constitution" (or contract), which had been executed by the District, H.S., and her parents, which bound all parties and governed the terms and conditions of H.S.' continued participation on the cheerleading squad. The Cheerleader Constitution ("the Contract") promulgated a disciplinary scheme utilizing curable demerits and, for certain reasons, immediate expulsion from the squad. The Contract, set out in Petitioner's Amended Complaint, did not condition cheerleading squad membership on cheering for each individual school athlete at all times, or under all circumstances, or when other cheerleaders cheered.

After H.S. was removed from the cheerleading squad on March 4, 2009, Bolton competed for the high school basketball team on the evening of March 4, 2009 in a second post-season playoff game.

On March 2, 2009, Bolton had threatened his science teacher, and instead of expulsion which would have barred his further participation in extramural activities, Bolton was assigned a lesser discipline, "In School Suspension," which would not affect his participation in extramural athletics. Specifically Bolton was given a two-day suspension which was calculated so that he was only in ineligible for the high school's post-season basketball games on March 5 and March 6, 2009.

Conveniently, there was no game on March 5, 2009, and while there was a basketball game on March 6, 2009, the Silsbee High School school day was shortened and Bolton was able to board the team bus for the third out-of-town playoff basketball game that evening. He would have played in that March 6, 2009 game but for H.S.' father reporting the matter to the University Interscholastic League (UIL), which governs extracurricular activities in Texas, which ordered the Silsbee Athletic Director to remove Bolton from the team and pull him from the team bus before it departed Silsbee.

After Bolton had been removed from the Silsbee team by the State on March 6, 2009, Superintendent Bain relented and lifted the ban on H.S.' future participation in the subsequent year (H.S.' senior year).

ARGUMENT

I. THE PANEL'S DECISION CONFLICTS WITH THE UNITED STATES SUPREME COURT'S DECISION IN *TINKER V. DES MOINES COMMUNITY INDEP. SCHOOL DISTRICT* AND PROGENY.

H.S.' momentary silence was admittedly not disruptive, if silence may ever disrupt. The Fifth Circuit's decision conflicts with the Court's previous decision, *Tinker v Des Moines Independent Community School District,* 393 U.S. 503, 507 (1969), and with the subsequent decisions that set forth the exceptions to the *Tinker* rule. *See Hazelwood School District v. Kuhlmeier,* 484 U.S. 260, 271 (1988); *Bethel School District no. 403 v. Fraser,* 478 U.S. 675 (1986); and *Morse v. Frederick,* 551 U.S. 493 (2007).

In *Tinker,* the Court recognized 50 years of precedent and began by stating that First Amendment rights are available to both teachers and students, and that neither "students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506. However, the Court said, "On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools. . . . Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities."

The *Tinker* Court found that the silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of the petitioners, and in the face of no evidence that the petitioners' interference collided with the work of the school or with the rights of other students to be secure and let alone, the wearing of the arm bands by the petitioners, was protected speech. *Id at* 508. Fear or apprehension of a disturbance is not enough to overcome the right to freedom of expression. Here, more passive expression than H.S.' momentary silence could hardly be imagined. The court recognized that "any word spoken, in class, in the lunchroom, or on the campus that deviates from the views of another person may start an argument or cause a disturbance. **But our Constitution says we must take the risk.**" *Id.* (Emphasis added.) There is no demonstrated risk or reasonable fear of disruption provoked by a silent child who had been sexually assaulted by a male who happened to be able to trade off school discipline (which seemed appropriate under the Petitioner's plead Silsbee Code of Conduct--for

at least Bolton's documented sexual aggression, breaking a window, fleeing the scene, and murderous threats against his classmates and the homeowner), in exchange for his athletic prowess.

In this case, there was no reason to anticipate that H.S.' silent refusal to cheer for Bolton individually, while he was at the free-throw line, would interfere with the work of the school or impinge upon the rights of other students. Therefore, Petitioners in this matter did not fail to state a claim upon which relief could be granted, and it was a premature and unwarranted accommodation to Respondents to dismiss H.S.' case claiming violation of her First Amendment rights, as recognized by *Tinker*. Even if the case is deemed to fall within the rubric of *Hazelwood* as school-sponsored speech, there was no legitimate educational purpose for the school officials' egregious actions. There was no argued, nor is there any demonstrable, pedagogical purpose within the meaining of *Hazelwood* to mandate that H.S. cheer Bolton.

II. THE FIFTH CIRCUIT IMPROPERLY DISREGARDED THE NO-COMPELLED SPEECH DOCTRINE OF THE UNITED STATES SUPREME COURT IN *WEST VIRGINIA BOARD OF EDUCATION v. BARNETTE*, 319 U.S. 624 (1943).

It is not hyperbole to state that the 16-year-old H.S. accused Bolton of having *violated her physically, emotionally and spiritually in the supporting presence of his small gang of fellow athletes.* When she cheered the Silsbee High School basketball team, she recognized that he was on its roster, but there were other members who had not assaulted her, and she cheered them. When

Bolton was ruled the victim of a game foul and rewarded with a free shot, the memory of his offense rankled H.S. and exhibited itself in silence. Bolton took his shot(s), the game went on. Superintendent Bain, the assistant superintendent, Principal Lokey, and Sponsor McInnis understood the message, and ordered that thenceforth H.S. cheer when others cheered -- for Bolton, her accused rapist, at the free-throw line.

To sustain the compulsory cheering of Bolton, the Fifth Circuit had to mis-state that the Contract conditioned H.S.' membership on the Silsbee High School cheerleading squad on cheering for Bolton individually, requiring H.S., Bolton's publicly claimed victim, to cheer Bolton when her fellow cheerleaders who were not Bolton's victims cheered for Bolton. To justify and bolster the compulsory or mandated cheering for Bolton individually, the Fifth Circuit had to conclude that H.S. was a "mouthpiece" for the school and thereby required to "utter what was not in her mind" because the Respondents demanded that further, public subjugation by H.S.

Paraphrasing *Barnette* at 642, "the action of the local authorities in compelling [H.S. to cheer her accused rapist] transcends constitutional limitations on their power and invades the sphere of intellect and spirit which is the purpose of the First Amendment to our Constitution to reserve from all official control."

III. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH THE UNITED STATES'S SUPREME COURT'S DECISION IN *BOARD OF REGENTS OF STATE COLLEGES v. ROTH*, 408 U.S. 564 (1972), APPLYING TEXAS LAW TO DETERMINING CONSTITUTIONAL PROPERTY AND LIBERTY INTERESTS.

This Court stated in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972), "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* at 577.

H.S. does not claim a right to enter into the Silsbee High School Cheerleader Constitution (the Contract), but having entered into that contract, to having due process before being deprived of the terms of that contract. The Fifth Circuit recognized that the Silsbee High School Cheerleader Constitution, executed by and binding upon the District, H.S. and her parents, constituted a contract. The Fifth Circuit then refused to recognize the property interest created by the Contract. Petitioner, H.S.' "property" interest in membership on the Silsbee High School cheerleading squad was created and defined by the terms of the Contract with the District. Those terms secured her interest in membership through the 2008-2009 school year, and through her high school cheerleading career to the extent that the Contract governed her removal from the cheerleading squad, which could not be continued in the subsequent school year (H.S.' senior

year) if she was terminated in membership according to the Contract's terms. *See Roth* at 578.

The Fifth Circuit's conclusion that H.S.' failure to cheer for Bolton individually at the free-throw line "constituted valid grounds for her removal from the cheer squad," (Appendix A, 5th Circuit Opinion, at 5a), does not view the facts pleaded in Plaintiffs' First Amended Complaint in a light most favorable to Petitioners. First, there was not a failure to cheer, because H.S. went to each game as scheduled with the basketball team that included the player accused of raping her. Further, the contract to cheer, which the panel recognized, did not require her to be terminated for refusing to cheer for a particular player on two occasions when he came to the free-throw line. The panel did not view the pleaded facts as true in a light most favorable to the Plaintiffs/Petitioners. Had the pleadings been properly reviewed by the 5th Circuit, Petitioner H.S. would have been clearly seen to have a contract, which created a property interest, *after she was accepted on the cheering squad.*

Like Constitutionally protected property interests, the parameters of those interests denominated "liberty" which are protected by the Fourteenth Amendment are also defined in their parameters by an independent source such as state law.

Petitioner, H.S., a minor who was sexually assaulted and was, at all times material to this claim, a patient in post-sexual assault therapy, was also in the midst of a criminal examination of her accused attacker's crime against her, albeit a first grand jury had ended its examination without returning any indictments. When

the Respondents compelled her to cheer publicly for the man she accused of raping her and caused her mental anguish, an invasion of her bodily integrity, although psychological and without physical injury, occurred. Further, the panel in this case, relying on *Spacek v. Charles*, 928 SW2d 88 (Tex. App. Houston [14th], 1996, writ denied), found that Texas law denies constitutional protection to psychological injures, unless accompanied by a physical injury. In *Spacek*, the court clarified that it was *not a corporal punishment case as stated by the Fifth Circuit in its citation*, but was, according to the Texas Court of Appeals, an excessive discipline case and found explicitly that physical injury is not required for a constitutional claim.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Honorable Court grant Certiorari to review the merits of the case.

Respectfully submitted,

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